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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CHERISE TOUHEY, on
behalf of herself and
all others similarly
situated,

Plaintiff,

v.

UNITED STATES OF AMERICA
and MICHAEL B. MUKASEY,
in his official capacity
as United States
Attorney General,

Defendants.

Case No. EDCV 08-1418-VAP
(RCx)

**[Motion filed on April 17,
2009]**

**ORDER DENYING MOTION TO
DISMISS**

Defendants' Motion to Dismiss came before the Court for hearing on June 15, 2009. After reviewing and considering all papers filed in support of, and in opposition to, the Motion, as well as the arguments advanced by counsel at the hearing, the Court DENIES the Motion.

I. BACKGROUND

A. Factual Allegations

On or about June 21, 2007, Drug Enforcement Administration ("DEA") agents seized \$26,943.83 from a bank account held by Plaintiff Cherise Touhey ("Plaintiff"), as well as other money from other accounts held by Plaintiff and accounts held by other persons. (Compl. ¶¶ 27-30.) On or about August 6, 2007, Plaintiff filed a claim with DEA contesting the forfeiture of the \$26,943.83. (*Id.* at ¶ 29.) On October 13, 2007, the government instituted a judicial forfeiture proceeding against some of the assets seized on June 21, 2007 but not against Plaintiff's \$26,943.83. (*Id.* at ¶ 30.) The government returned Plaintiff's \$26,943.83 on January 9, 2008 but "did not include the nearly seven months' interest accrued on the funds, and the [D]efendants have never returned said interest to [Plaintiff]." (*Id.* at ¶ 31.)

B. Procedural History

On October 14, 2008, Plaintiff, on behalf of herself and all others similarly situated, filed a putative class action Complaint against Defendants United States of America and Michael B. Mukasey seeking: (1) "[A]n injunction and/or declaratory relief ordering payment or disgorgement of interest accrued on all seized funds later returned" pursuant to 5 U.S.C. § 701, *et seq.*; and

1 (2) "[A]n injunction and/or declaratory relief ordering
2 defendants to pay interest on all returned funds as to
3 all pending and future seizures" pursuant to 5 U.S.C. §
4 701, et seq.

5
6 On April 17, 2009, Defendants filed a "Motion to
7 Dismiss Action" ("Motion") and Request for Judicial
8 Notice ("RJN"), with six exhibits attached. Plaintiff
9 filed Opposition on May 4, 2009. Defendants filed a
10 Reply on May 15, 2009 and a Supplemental Request for
11 Judicial Notice ("Supp. RJN"), attaching two additional
12 exhibits.

13 14 II. LEGAL STANDARD

15 Under Rule 12(b)(6), a party may bring a motion to
16 dismiss for failure to state a claim upon which relief
17 can be granted. As a general matter, the Federal Rules
18 require only that a plaintiff provide "'a short and plain
19 statement of the claim' that will give the defendant fair
20 notice of what the plaintiff's claim is and the grounds
21 upon which it rests." Conley v. Gibson, 355 U.S. 41, 47
22 (1957) (quoting Fed. R. Civ. P. 8(a)(2)); Bell Atlantic
23 Corp. v. Twombly, 550 U.S. 544, 555 (2007). In addition,
24 the Court must accept all material allegations in the
25 complaint - as well as any reasonable inferences to be
26 drawn from them - as true. See Doe v. United States, 419

1 F.3d 1058, 1062 (9th Cir. 2005); ARC Ecology v. U.S.
2 Dep't of Air Force, 411 F.3d 1092, 1096 (9th Cir. 2005).

3
4 "While a complaint attacked by a Rule 12(b)(6)
5 motion to dismiss does not need detailed factual
6 allegations, a plaintiff's obligation to provide the
7 'grounds' of his 'entitlement to relief' requires more
8 than labels and conclusions, and a formulaic recitation
9 of the elements of a cause of action will not do." Bell
10 Atlantic, 550 U.S. at 555 (citations omitted). Rather,
11 the allegations in the complaint "must be enough to raise
12 a right to relief above the speculative level." Id.

13
14 In other words, the allegations must be plausible on
15 the face of the complaint. See Ashcroft v. Iqbal, 556
16 U.S. ___, 129 S. Ct. 1937, 1949 (2009). "The plausibility
17 standard is not akin to a 'probability requirement,' but
18 it asks for more than a sheer possibility that a
19 defendant has acted unlawfully. Where a complaint pleads
20 facts that are 'merely consistent with' a defendant's
21 liability, it stops short of the line between possibility
22 and plausibility of 'entitlement to relief.'" Id.
23 (citations and internal quotations omitted).

24
25 Although the scope of review is limited to the
26 contents of the complaint, the Court may also consider
27 exhibits submitted with the complaint, Hal Roach Studios,

1 Inc. v. Richard Feiner & Co., 896 F.2d 1542, 1555 n.19
2 (9th Cir. 1990), and "take judicial notice of matters of
3 public record outside the pleadings," Mir v. Little Co.
4 of Mary Hosp., 844 F.2d 646, 649 (9th Cir. 1988).

6 **III. DISCUSSION**

7 Defendants move to dismiss Plaintiff's Complaint
8 claiming: (1) Plaintiff lacks standing to bring her
9 claims; (2) the Court has limited review of APA actions
10 and should not review the APA's actions in this case; (3)
11 Plaintiff has not exhausted her administrative remedies
12 under the APA, 5 U.S.C. § 701, et seq., before filing
13 this lawsuit; and (4) Plaintiff cannot state a claim for
14 violation of the APA or the Little Tucker Act, 28 U.S.C.
15 § 1346(a)(2). (See Mot. at 1-2.)

17 **A. Standing**

18 Defendants move the Court to dismiss Plaintiff's
19 Complaint because Plaintiff lacks standing. (See Mot. at
20 13-16.) To satisfy the Court's standing requirements
21 under Article III to the United States Constitution, a
22 plaintiff must show: (1) injury in fact; (2) causation;
23 and (3) redressability. See Friends of the Earth, Inc.
24 v. Laidlaw Environmental Serv. (TCO), Inc., 528 U.S. 167,
25 168-69 (2000) (citing Lujan v. Defenders of Wildlife, 504
26 U.S. 555, 560-61 (1992)).

1 **1. Injury in Fact**

2 Plaintiff's purported injury was Defendants' return
3 of Plaintiff's seized money without the interest it
4 accrued during the seven months the Government held it.
5 (See Compl. at ¶ 31.) To show injury in fact, a
6 Plaintiff must have suffered "an invasion of a legally
7 protected interest which is (a) concrete and
8 particularized; and (b) actual or imminent, not
9 conjectural or hypothetical." Lujan, 504 U.S. at 560
10 (internal citations and quotations omitted).
11

12 According to Defendants, Plaintiff cannot show she
13 has suffered an injury in fact because they had no legal
14 obligation to pay interest accrued on Plaintiff's seized
15 money at the time they returned the money. (See Mot. at
16 14.) That requirement - to return accrued interest on
17 money the Government seized improperly, even in the
18 absence of a court order requiring them to do so - only
19 arose after issuance of Carvajal v. United States, 521
20 F.3d 1242 (9th Cir. 2008); Carvajal, decided four months
21 after the Government returned Plaintiff's money, "caused
22 a change in the law and created a new legal obligation
23 that had not previously existed." (Mot. at 10.)¹
24 Defendants argue the obligations imposed by Carvajal do
25 not apply to their actions here because they returned the
26

27 ¹ In their moving papers, Defendants attack Carvajal
28 and argue the Court should not follow it. (See Mot. at
5, 11-12.) Carvajal is binding precedent.

1 seized funds before the Ninth Circuit issued its
2 decision, and therefore Plaintiff cannot show injury in
3 fact. (Id.)

4
5 In opposition, Plaintiff argues Carvajal did not
6 change the law, but rather recognized the continued
7 viability of the legal obligation to return interest on
8 improperly seized assets, announced thirteen years
9 earlier in U.S. v. \$277,000 U.S. Currency, 69 F.3d 1491
10 (9th Cir. 1995). (See Opp'n at 9-11.) According to
11 Plaintiff, Defendants breached their legal obligation,
12 existing at the time it returned Plaintiff's seized funds
13 without any interest, thereby demonstrating her injury in
14 fact. (Id. at 10.)

15
16 In \$277,000, the government seized cash and a truck
17 from Ramon Montes and instituted forfeiture proceedings
18 against the property. 69 F.3d at 1492. After
19 approximately five years, the district court ordered the
20 government to return the property to Mr. Montes with
21 interest. Id. The government moved to set aside the
22 judgment, the district court denied the motion, and the
23 government appealed. Id.

24
25 On appeal, the government argued sovereign immunity
26 barred Mr. Montes' recovery of prejudgment interest. Id.
27 at 1493. The Ninth Circuit recognized the rule that
28

1 "interest cannot be recovered in a suit against the
2 government in the absence of an express waiver of
3 sovereign immunity from an award of interest." Id.
4 (internal quotations and citation omitted). Despite the
5 rule, the court found the case did not implicate
6 sovereign immunity, as "[t]here [was] no element ... of
7 forcing the government to pay for damage it ha[d] done,
8 only [an order] that it must disgorge benefits that it
9 ha[d] actually and calculably received from an asset that
10 it ha[d] been holding improperly." Id. at 1498. Thus,
11 the court affirmed the district court's denial of the
12 government's motion. Id.

13
14 Thirteen years later, the Ninth Circuit revisited the
15 issue in Carvajal, when it determined whether or not the
16 holding in \$277,000 remained viable after Congress passed
17 the Civil Asset Forfeiture Reform Act ("CAFRA") in 2000.
18 521 F.3d at 1244. Under CAFRA, a person may recover
19 interest accrued on improperly seized assets "when the
20 government institutes civil forfeiture proceedings and a
21 plaintiff substantially prevails." Carvajal, 521 F.3d at
22 1247; see also 28 U.S.C. § 2465(b)(1)(C).

23
24 In Carvajal, the plaintiff sought return of "accrued
25 interest on currency that the government wrongfully
26 seized and then returned 10 months later, without having
27 instituted judicial foreclosure proceedings." Id. The
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1 plaintiff brought her claim for interest under \$277,000,
2 not under CAFRA.

3
4 The Ninth Circuit found "CAFRA [did not] supplant[]
5 all pre-CAFRA forfeiture law" and, because it "did not
6 address in any way what happens in the absence of a civil
7 forfeiture proceeding," the holding in \$277,000 remained
8 good law and did not conflict with CAFRA. Carvajal, 521
9 F.3d at 1247-49. Furthermore, the court declined the
10 government's request to "read into \$277,000 ... the
11 requirement of a court order before interest accrues on
12 improperly seized money." Id. at 1245-46. The court
13 found the government's own determination that it held
14 funds improperly and decision to return the funds
15 obviated the need for a court order. Id. Accordingly,
16 the court found the district court improperly dismissed
17 the plaintiff's claim for interest on her improperly
18 seized funds. Id. at 1249.

19
20 Defendants' attempts to evade the holding of Carvajal
21 fail. That case did not create a change in forfeiture
22 law, but rather recognized the continued viability of
23 \$277,000 and its application in the very context
24 presented here. In other words, when Defendants returned
25 Plaintiff's money to her, \$277,000 required the
26 government to return interest earned on the money to
27 Plaintiff, as the Carvajal decision later explicitly
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1 held. Carvajal, 521 F.3d at 1247-49. Defendants'
2 failure to return the earned interest to Plaintiff
3 constitutes Plaintiff's injury in fact. Accordingly,
4 this prong of the standing analysis is satisfied.

5 6 **2. Causation**

7 As to the causation prong, Defendants baldly argue
8 Plaintiff "is incapable of ... alleging a causal
9 connection between her alleged injury (the non-receipt of
10 interest on the returned funds) and any agency action."
11 (Mot. at 15.) According to Defendants, they relied on
12 their interpretation of CAFRA by returning Plaintiff's
13 money without interest. (Id.) Finally, Defendants argue
14 Plaintiff's commencement of this lawsuit before asking
15 them for the interest "had the effect of preventing
16 agency action on the request, nullifying any potential
17 causal connection." (Id. at 16.)

18
19 To satisfy the causation requirement, a plaintiff
20 must show a "causal connection between the injury and the
21 conduct complained of - the injury has to be 'fairly ...
22 trace[able] to the challenged action of the defendant,
23 and not th[e] result [of] the independent action of some
24 third party not before the court.'" Lujan, 504 U.S. at
25 560 (quoting Simon v. E. Ky. Welfare Rights Org., 426
26 U.S. 26, 41-42 (1976)).

1 Defendants' arguments are not persuasive.
2 Plaintiff's injury - non-receipt of the interest owed her
3 - was a direct result of Defendants returning her money
4 without accrued interest. Whether or not Plaintiff first
5 asked Defendants for the interest before filing her
6 lawsuit is irrelevant to this inquiry; her injury
7 occurred when she received her seized funds without
8 interest. There exists a direct connection between
9 Defendants' action and Plaintiff's injury.

11 **3. Redressability**

12 Defendants argue "Plaintiff cannot demonstrate a
13 likelihood of redress for the reasons explained in these
14 papers. The utter lack of agency action is an absolute
15 bar to her APA claims." (Mot. at 16.)

17 To satisfy the redressability requirement, the
18 plaintiff must show "it must be likely, as opposed to
19 speculative, that the injury will be redressed by a
20 favorable decision." Lujan, 504 U.S. at 560 (internal
21 quotations and citation omitted).

23 Clearly, a judgment from this Court ordering
24 Defendants to pay Plaintiff the interest accrued on her
25 money while the Government held it would redress
26 Plaintiff's injury. Thus, Plaintiff satisfies this
27 prong.

1 Accordingly, the Court finds Plaintiff has
2 established her standing to bring this lawsuit.

3
4 Furthermore, Plaintiff has stated a claim for
5 violation of the APA by alleging facts that fall squarely
6 under \$277,000, as recognized in Carvajal.

7
8 **B. APA Reviewable Agency Action & Exhaustion**

9 Next, Defendants argue the Court does not have
10 jurisdiction to hear this case for two reasons: (1)
11 Plaintiff seeks judicial intervention for an agency
12 action that was not final nor reviewable by the Court;
13 and (2) Plaintiff did not exhaust her administrative
14 remedies before filing this lawsuit. (See Mot. at 17-
15 20.) In Opposition, Plaintiff argues Defendants' return
16 of her money without interest constituted a final agency
17 action and she had no venue in which to bring her claim
18 besides this Court, as there were no further
19 administrative remedies available to her. (See Opp'n at
20 12.)

21
22 Claims brought under the APA, as are Plaintiff's
23 here, may be brought only to review final agency actions.
24 See 5 U.S.C. § 704. Courts apply the exhaustion doctrine
25 - that is, to require aggrieved persons to bring their
26 complaint first against the agency, before seeking
27 judicial intervention - "to allow an administrative
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1 agency to perform functions within its special competence
2 to make a factual record, to apply its expertise, and to
3 correct its own errors so as to moot judicial
4 controversies." Parisi v. Davidson, 405 U.S. 34, 37
5 (1972).

6
7 Here, the Court is not persuaded by Defendants'
8 argument that their return of Plaintiff's money did not
9 constitute a final agency action for the purposes of the
10 APA. The decision by Defendants not to institute
11 forfeiture proceedings against Plaintiff's money and
12 return the money to Plaintiff constituted a final
13 decision with respect to that asset. There is no
14 evidence before the Court to demonstrate the return of
15 Plaintiff's money was conditional, for example.
16 Accordingly, the Court finds Plaintiff's claims arise
17 from a final agency action, meeting the requirements of 5
18 U.S.C. § 704.

19
20 Turning to Defendants' exhaustion argument, the Court
21 finds Plaintiff has exhausted her administrative
22 remedies. Based on the record here, there was no
23 explicit administrative procedure within which Plaintiff
24 could assert her claims for the interest earned on her
25 seized money. Although Plaintiff challenges a final
26 action by an administrative agency, the agency provided
27 no procedure for Plaintiff to raise her claim; thus, the
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1 Court declines to dismiss Plaintiff's Complaint for her
2 failure to comply with a non-existent administrative
3 procedure.

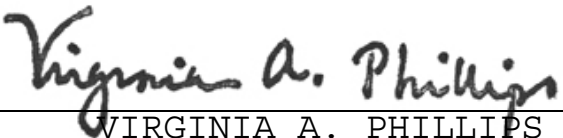
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5 **C. Venue**

6 Next, Defendants argue this Court is not the proper
7 venue for this action and urges the Court to transfer the
8 case to the Court of Federal Claims. (See Mot. at 28-
9 30.) Defendants point out not all Circuits have adopted
10 the rule of the Ninth Circuit, recognizing the duty of
11 the government to return interest accrued on seized
12 assets it returns; thus, certifying a nationwide class
13 action would be improper in this case. (Id.) As
14 Plaintiff argues in Opposition, Defendants cite no
15 authority for this argument. Accordingly, the Court
16 finds Defendants' position on this issue unfounded.

1 IV. CONCLUSION

2 For the foregoing reasons, the Court DENIES
3 Defendants' Motion to Dismiss.²

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6 Dated: August 20, 2009


VIRGINIA A. PHILLIPS
United States District Judge

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22 ² The Court does not consider Defendants' arguments
23 regarding Plaintiff's purported release of her claims.
24 Consideration of both parties' arguments on this issue
25 requires the evaluation of documents outside the four
26 corners of the Complaint, and of which the Court cannot
27 take judicial notice, such as the correspondence of
28 counsel between August 6, 2007 and January 2, 2008 about
the return of Plaintiff's funds and the Government's
request that Plaintiff sign a Release. See Hal Roach
Studios, Inc. v. Richard Feiner & Co., 896 F.2d 1542,
1555 n.19 (9th Cir. 1990). The Court declines to convert
this Motion into one seeking summary judgment.
Accordingly, for the purposes of this Motion, the Court
does not consider those arguments.